Case No 202302466/A1

Neutral Citation No [2024] EWCA Crim 167
IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM THE CROWN COURT AT LUTON
His Honour Judge Kay KC

Royal Courts of Justice, Strand
London WC2A 2LL
Wednesday 7 February 2024

Before:

LADY JUSTICE ANDREWS
MRS JUSTICE CHEEMA-GRUBB
-and-
HER HONOUR JUDGE ROSA DEAN
(THE RECORDER OF REDBRIDGE)

REX
V
ADEBAYO KEKERE-EKUN

Computer Aided Transcript of Epiq Europe Ltd,
Lower Ground Floor, 46 Chancery Lane, London WC2A 1JE
Tel No: 020 7404 1400; Email: rcj@epiqglobal.co.uk (Official Shorthand Writers to the Court)

Ms S Nwosu appeared on behalf of the Applicant.
Ms Squire appeared on behalf of the Respondent

J U D G M E N T

Lady Justice Andrews:

1. The single issue in this appeal against the appellant's sentence for murder is whether all or any part of the 39 days that he spent abroad awaiting extradition from Nigeria should have been credited towards the minimum term of his life sentence. Unfortunately, this matter appears to have been overlooked in the court below and therefore it was not drawn to the sentencing judge's attention. This oversight by all parties is accepted by the Crown. We are very grateful to Ms Squire for attending this morning to confirm the position.

2. A similar issue arose in *R v Noye* [2013] EWCA Crim 510, although in that case the appellant had been detained in custody in Spain awaiting extradition for a much longer period (9 months). In *Noye*, the Court of Appeal considered the differences between the sentencing regime which applied in that case, and the current regime following the coming into force of the Criminal Justice Act 2003. Prior to the coming into force of the 2003 Act, the relevant statutory provisions were in sections 47(1) to (3) of the Criminal Justice Act 1991. Under those provisions, the court had a discretion to direct that some or all of the period spent in custody abroad awaiting extradition should count towards sentence. The court had the power to specify such period "as in the opinion of the court is just in all the circumstances" provided it did not exceed the period spent in custody abroad. Each case turned on its specific facts and all relevant factors had to be considered, including why the person went and stayed abroad, and whether there was any resistance to the extradition proceedings.

3. It was recognised to be an important point for consideration that it should not be thought by those who flee this country in the hope of evading justice that, if they are caught and remain in custody in a foreign country for a period of time, the period of time will necessarily be considered as though it had been spent in this country serving the sentence imposed by its courts (see the observations of Lord Judge LCJ in *Noye*, at paragraph 16). Lord Judge underlined this message at paragraph 19, which explains why the appeal in *Noye* was dismissed:

> "As it seems to us, if this discretion may be exercised in such a way as to refuse to make any allowance for the time spent in custody abroad pending extradition — and plainly the statutory language underlines that it can — it would fall to be exercised where a defendant deliberately fled this country in a well-organised, sophisticated plan to evade justice here; successfully evaded justice for some time by staying abroad; when eventually brought before the courts abroad with a view to extradition, contested the extradition proceedings every inch of the way, and, what is more, put up a totally false story in order to evade extradition followed by...an unsuccessful appeal against the order."

4. The relevant provision for crediting time served by fixed-term prisoners are now sections 240 and 243 of the 2003 Act. These allow for credit to be given to an extradited prisoner for time served abroad awaiting extradition, provided by section 240(4), that any period will *not* apply to the extent that "it is in the opinion of the court just in all the circumstances *not* to give the appropriate direction". [Emphasis added].

5. The effect of the change is that rather than justifying the exercise of the discretion to direct that some or all of the period should count, the sentencing court is required to justify making a decision that it *should not* count. However, whether the offence was committed before or after the 2003 Act came into force, the main consideration is what is just.

6. Whilst the Court of Appeal in Noye acknowledged that these provisions do not apply expressly to mandatory life sentences, section 269(3) of the 2003 Act, provides that the minimum term in such a case should take into account the effect of any direction that would have been made under section 240 had the sentence been a fixed term sentence. The same position arises by virtue of the application of section 269(3)(b) to the Transitional Provisions, which govern the present case - section 240ZA and section 243(2A) of the 2003 Act.

7. The deceased, a young man named Marcus Hall, was among a group of friends who became involved in a violent altercation with another group of young men outside a

nightclub in Luton, in the early hours of the morning of 21 March 2001. At some point Mr Hall became separated from his group and was stabbed, kicked and stamped on by several members of the other group. He later died from his injuries.

8. Following the circulation by police of images of various people they wished to speak to, a police officer identified the appellant and the police made it known that he was wanted for questioning in connection with the murder. In August 2001, the appellant's brother provided a statement to the police identifying him from footage shown on the BBC's Crime Watch programme. However, the appellant left this country for Nigeria (his country of birth) on an unknown date, and the police were therefore unable to apprehend him. It was accepted at the time of his sentence that he knew he was wanted by the police at the time when he left the country.

9. In 2002, a number of men were tried at the Central Criminal Court and convicted of Mr Hall's murder. A further man was tracked to the USA and extradited. He too was convicted of the murder following a trial in 2004.

10. On 12 February 2015, the appellant was arrested in Lagos for unrelated matters. He was then using a different name but after his fingerprints were taken, his identity was confirmed. Once it became known that he was wanted in the UK for the offence of murder, he was arrested for that offence. He was detained in custody in Lagos and then transferred to Abuja, where an Extradition Notice was served on him. He did not contest his extradition and was returned to the UK on 24 March 2015, where he was immediately handed over to and arrested by the UK authorities. The day after his arrest in Nigeria, he provided information to an Inspector Ebelo (a Nigerian police officer) and provided a voluntary signed statement in which he accepted presence at the scene of the incident in Luton in 2001, and that he had kicked the deceased once or twice.

11. On 27th March 2015, at a preliminary hearing in the Crown Court at Luton, the appellant indicated an intention to plead guilty to murder and a basis of plea was submitted. In due course, he appeared before HHJ Kay KC on 4 September 2015 and pleaded guilty to the

charge of murder. Since the date of the murder predated the coming into force of Schedule 21 of the Criminal Justice Act 2003, the sentence imposed by the sentencing judge was arrived at by the application of transitional arrangements for mandatory life sentences for offences committed before December 2003, as provided by section 276 and Schedule 22 of the Criminal Justice Act 2003.

12. The judge explained that he was passing sentence after the commencement of section 269 of the 2003 Act in respect of an offence committed before that date, and he was therefore constrained in his approach by paragraphs 9 and 10 of Schedule 22. That meant he was required to have regard to what the Secretary of State would have been likely to notify as the minimum term to be served under the regime as it existed in 2001 and earlier.

13. The judge had regard to the sentences passed on the others who were convicted of the same murder, and who had been engaged in similar activity to the appellant. He set a minimum term of 10 years' imprisonment, about which no complaint can be or is made. He directed that the time that the appellant had spent in custody in the UK was to be counted against his sentence, resulting in a period of 9 years and 202 days to serve before he would be eligible for release.

14. In the present case, it is true that the appellant deliberately fled the country to avoid being arrested for the murder and that he managed to evade detection for 14 years. However, those matters have already been taken into consideration as part of his sentence. Although he pleaded guilty at the earliest opportunity, and indeed made admissions the day after his arrest, in deciding on the minimum term the judge set against the credit to which the appellant would otherwise have been entitled for his guilty plea (which under the relevant regime was 20 months) the period during which he had evaded justice.

15. It was not until June 2023 that the appellant contacted the solicitor who had represented him at trial, and raised the query about whether the time he spent in custody in Nigeria should also have been counted against his sentence. This was a matter that he had only recently found out about whilst he was in custody. The necessary extension of time for

seeking leave to appeal was properly granted by the single judge in those circumstances.

16. Given that the appellant did all the right things once he was apprehended in Nigeria - he co-operated in his extradition, and he made admissions as to his role in the murder at an early stage - we consider that it is in the interests of justice to direct that the full period of 39 days he spent in custody in Nigeria awaiting extradition should count towards the minimum term of his sentence.

17. We therefore allow this appeal and vary the sentence to one of life imprisonment with a minimum term of 10 years, with a direction that the time that the appellant spent in custody in Nigeria awaiting extradition and the time that he spent in custody in the UK shall both be counted towards his sentence, resulting in a term of 9 years and 163 days to serve before he is eligible for release.

18. The Court is very grateful indeed to Ms Nwosu for her very helpful skeleton argument in this case, which has illuminated the matter for us and made it very easy to decide how we should determine the appeal.